

ISSUED: September 6, 2002

D.T.E. 02-34

Petition of Canal Electric Company, Cambridge Electric Light Company, and Commonwealth Electric Company for approval to divest Canal's ownership interest in the Seabrook Nuclear Power Station, approval of amendments to the Power Contract between Canal, Cambridge, and Commonwealth, and for findings under § 32(c) of the Public Utility Holding Company Act of 1935.

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I. INTRODUCTION

On May 17, 2002, Canal Electric Company (“Canal”), Cambridge Electric Light Company (“Cambridge”), and Commonwealth Electric Company (“Commonwealth”) (collectively, “NSTAR Companies”) filed a petition with the Department of Telecommunications and Energy (“Department”) for the following: (1) approval of the sale of Canal’s interest in the Seabrook Nuclear Power Station (“Seabrook”), located in Seabrook, New Hampshire, to FPL Energy Seabrook, LLC (“FPLE Seabrook”); (2) approval of a buyout agreement to amend the power contract between Canal, Cambridge, and Commonwealth; and (3) findings regarding the treatment of the divested assets as eligible facilities so that FPLE Seabrook may apply to the Federal Energy Regulatory Commission (“FERC”) for exempt wholesale generator (“EWG”) status under § 32(c) of the Public Utility Holding Company Act of 1935, codified as 15 U.S.C. § 79z-5a (“PUHCA”). The Department docketed this matter as D.T.E. 02-34.

Pursuant to notice duly issued, a public hearing was held on June 12, 2002. The Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a notice of intervention as of right pursuant to G.L. c. 12, § 11E. FPLE Seabrook was permitted to intervene as a full party. The Department granted limited participant status to New England Power Company (“NEP”); Connecticut Light and Power Company (“CL&P”); and to

J.P. Morgan Securities, Inc. ("J.P. Morgan"). Because the petitions of NEP in D.T.E. 02-33¹ and of CL&P in D.T.E. 02-35² have issues and facts in common with the NSTAR Companies' petition in this proceeding pertaining to either the approval of the sale or findings under PUHCA, or both, the Department consolidated the evidentiary hearings in all three proceedings as to those two issues for administrative efficiency. The dockets themselves were not consolidated, and the Department issued separate orders in these companion dockets.

The Department conducted a consolidated evidentiary hearing on July 1, 2002.³ The Department conducted a second day of hearings pertaining only to the NSTAR Companies' petition in D.T.E. 02-34 on July 2, 2002. In support of its petition, the NSTAR Companies sponsored the testimony of Robert H. Martin, director of electric energy supply, asset divestiture, and outsourcing for NSTAR Electric and Gas Corporation. The NSTAR Companies and NEP co-sponsored the testimony of Paul M. Dabbar, vice-president of the natural resources group of J.P. Morgan, the auction agent for the proposed sale. The

¹ The Department approved NEP's petition for approval of the sale of NEP's interest in Seabrook to FPLE Seabrook and for findings by the Department regarding the treatment of the Seabrook assets as eligible facilities under § 32(c) of PUHCA. New England Power Company, D.T.E. 02-33 (2002).

² The Department approved CL&P's filed a petition for findings by the Department regarding the treatment of the Seabrook assets as eligible facilities under § 32(c) of PUHCA. Connecticut Light & Power Company, D.T.E. 02-35 (2002).

³ In support of its petition in D.T.E. 02-33, NEP sponsored the testimony of Terry L. Schwennesen, vice-president and director of generation investments for NEP. In support of its petition in D.T.E. 02-35, CL&P sponsored the testimony of Donald M. Bishop, manager of regulatory policy-Massachusetts for Northeast Utilities Service Company. The testimony of these witnesses in the July 1, 2002 consolidated evidentiary hearing is part of the record in D.T.E. 02-34.

NSTAR Companies, FPLE Seabrook, and the Attorney General filed initial briefs on July 31, 2002. On August 5, 2002, FPLE Seabrook filed a reply brief, and the NSTAR Companies file a joint reply brief with NEP. The Attorney General did not file a reply brief. The evidentiary record contains 88 exhibits and twelve responses to record requests.⁴

II. STANDARD OF REVIEW

The Legislature has vested broad authority in the Department to regulate the ownership and operation of electric utilities in the Commonwealth. See, e.g., G.L. c. 164, § 76. The Department's authority was most recently augmented by the Electric Industry Restructuring Act. St. 1997, c. 164 ("Restructuring Act"). Boston Edison Company, D.P.U./D.T.E. 96-23, at 9 (1998). The Restructuring Act requires that each electric company organized under the provisions of G.L. c. 164 file a plan for restructuring its operations to allow for the introduction of retail competition in generation supply. G.L. c. 164, § 1A(a). Among other things, the Restructuring Act requires that all restructuring plans contain a detailed accounting of the company's transition costs and a description of the strategy to mitigate those transition costs. Id. One possible mitigation strategy is the divestiture of a company's generating units. G.L. c. 164, § 1.

In reviewing a company's proposal to divest its generating units, the Department considers the consistency of the proposed transactions with the company's restructuring plan, or in some cases the company's restructuring settlement, and the Restructuring Act. A divestiture

⁴ Although the documents were entered into evidence in the three dockets separately, the Department allowed documents from D.T.E. 02-33 and D.T.E. 02-35 to be incorporated in the instant proceeding by reference (Tr. 1, at 205).

transaction will be determined to be consistent with the company's restructuring plan or settlement and the Restructuring Act if the company demonstrates to the Department that the "sale process is equitable and maximizes the value of the existing generation facilities being sold." G.L. c. 164, § 1A(b)(1). A sale process will be deemed both equitable and structured to maximize the value of the existing generating facilities being sold, if the company establishes that it used a "competitive auction or sale" that ensured "complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale." G.L. c. 164, § 1A(b)(2).

The Restructuring Act provides that all proceeds from any such divestiture of generating facilities "that inure to the benefit of ratepayers, shall be applied to reduce the amount of the selling company's transition costs." G.L. c. 164, § 1A(b)(3). Where the Department has approved a company's restructuring plan or settlement as consistent or substantially compliant with the Restructuring Act, the Department will approve a company's proposed ratemaking treatment of any divestiture proceeds if the company's proposal is consistent with the company's approved restructuring plan or settlement.

III. SEABROOK DIVESTITURE

A. Overview

Canal proposes to divest its generation interest in Seabrook to FPLE Seabrook (Exh. NSTAR-2, at 2).⁵ This sale is part of a control transaction in which other owners of

⁵ Canal's interest in Seabrook includes a share of Seabrook Unit 1, an operational 1,161 megawatt nuclear power plant; Seabrook Unit 2, a partially constructed unit that is not operational; and nuclear fuel inventories (Exh. NSTAR-2, at 2, 13).

Seabrook will divest their ownership interests totaling 88.23 percent of the Seabrook assets; the non-selling owners will retain their minority ownership interests.⁶ Canal has a 3.52317 percent ownership interest in Seabrook (*id.* at 5). The proposed total purchase price for the sellers' interests combined is \$836.6 million (*id.* at 13). In addition to acquiring the sellers' interests in the Seabrook assets, FPLE Seabrook will assume the liabilities associated with each seller's ownership interest, including, among other things, all on-site environmental liabilities, spent nuclear fuel disposal liabilities, and decommissioning liabilities (Exh. NSTAR-3, Purchase and Sale Agreement at § 2.3 ("PSA")).⁷

Seabrook was offered for sale in a public auction conducted under the supervision of the New Hampshire Public Utilities Commission ("NHPUC") and the Connecticut Department

⁶ The selling owners' interests in Seabrook are as follows: North Atlantic Energy Corporation, 35.98201 percent; CL&P, 4.05985 percent; United Illuminating Company, 17.50000 percent; Great Bay Power Corporation, 12.13240 percent; Little Bay Power Corporation, 2.89989 percent; NEP, 9.95766 percent; Canal, 3.52317 percent; and New Hampshire Electric Cooperative, 2.17391 percent (Exh. NSTAR-2, at 5).

⁷ The assets of the seller's decommissioning fund will be transferred to FPLE Seabrook's decommissioning fund at the close of the sale (PSA at § 5.10(b)). In the event that FPLE Seabrook or its successors complete decommissioning, and the sellers' "customer contributions" to the decommissioning fund remain, those customer contributions will be returned to customers to the extent required by the applicable state law, including "all laws, rules, regulations, codes, injunctions, judgments, orders, decrees, rulings, interpretations, constitution, ordinance, common law, or treaty, of any Governmental Authority" (PSA at §§ 5.10(h), 13).

of Public Utility Control (“CTDPUC”) (Exh. NSTAR-2, at 2).⁸ NHPUC and CTDPUC selected J.P. Morgan to conduct the auction⁹ under supervision of NHPUC’s Staff and CTDPUC’s Utility Operations and Management Analysis auction team (“UOMA”) (id. at 3). J.P. Morgan was selected through a competitive solicitation process conducted by NHPUC and in coordination with CTDPUC (id. at 3).

B. Auction Process

1. Positions of the Parties

The NSTAR Companies argue that the auction was “open and competitive, consistent with the Department’s precedent of encouraging competitive auctions to maximize the value of generation assets, and thus, reduce transition charges for the Companies’ customers” (NSTAR Companies Initial Brief at 13, citing Cambridge Electric Light Company, Commonwealth

⁸ New Hampshire law provides that NHPUC administers the sale of generation assets that are located in New Hampshire. N.H. Rev. Stat. Ann. § 369-B:3(IV)(b)(13); 2001 N.H. Laws 29:15; PSNH Proposed Restructuring Settlement, Order Addressing Motions for Clarification and Rehearing, Amended Settlement Agreement and Financing Issues, Order No. 23,549, N.H.P.U.C. Docket No. DE 99-099 (Sept. 8, 2000). Connecticut law provides that utilities seeking to divest nuclear generation assets must submit a divestiture plan for approval by the CTDPUC. Conn. Gen. Stat. § 16-244g. The CTDPUC sets a minimum bid price and appoints a consultant to conduct the auction process. Id. There are no analogous provisions under Massachusetts law that required the Seabrook auction to be conducted by the Department.

⁹ Each selling owner of Seabrook executed a “Participation, Compensation and Indemnity Agreement” acknowledging that NHPUC and CTDPUC selected J.P. Morgan as the financial advisor and auction agent for the sale and limiting the sellers’ participation to providing input during the auction process, accepting or rejecting bids, providing input during the post-bid negotiations, and accepting or rejecting the final negotiated terms (Exh. DTE-NSTAR-1-7, att. A at 2-6).

Electric Light Company, Canal Electric Company, D.T.E. 98-78/83, at 10-11 (1998)).¹⁰ The NSTAR Companies describe the first stage of the auction process as an information-gathering stage, during which J.P. Morgan solicited interest from entities known or believed to be potential bidders based on previous public statements, industry position, or participation in recent sales of nuclear assets (Exh. NSTAR-2, at 6). According to the NSTAR Companies, J.P. Morgan then distributed an offering memorandum describing the Seabrook assets in detail to potential bidders that J.P. Morgan determined were technically and financially qualified to purchase and operate Seabrook (id.).

The NSTAR Companies explained that during the due diligence phase of the auction, bidders received access to an electronic data room containing the documents that were compiled for the sale process including “frequently asked questions” about Seabrook (id.). The NSTAR Companies state that bidders participated in individual pre-bid meetings with J.P. Morgan and Seabrook management representatives, and were permitted to submit confidential questions, which J.P. Morgan addressed (id. at 7). Bidders were provided an opportunity for a site visit (id.). J.P. Morgan prepared and distributed prototype transaction documents upon which all bids were required to be based (id.). The NSTAR Companies state that these prototype transaction documents included a form of purchase and sale agreement, a form of interconnection agreement, and several forms of power purchase agreements (id.).

¹⁰ The Attorney General notes that neither the Department nor the Massachusetts selling owners participated in the final negotiations (Attorney General Initial Brief at 3). The Attorney General, however, argues not that the auction process was inequitable, but rather, that the result of the process does not treat Massachusetts consumers fairly (id.).

The NSTAR Companies state that once bidders submitted the initial binding bids, J.P. Morgan analyzed the bids to determine which potential buyers were most likely to enable J.P. Morgan and the Seabrook owners to achieve their objectives (id. at 10). The NSTAR Companies claim these objectives included meeting all requirements under New Hampshire and Connecticut law; transferring all material assets, entitlements, obligations, and liabilities associated with the Seabrook assets; maximizing opportunities for current Seabrook employees after the sale; and ensuring that the transaction would close in a timely manner (id. at 10-11). The NSTAR Companies further claim that bids were also evaluated based upon an assessment of each bidder's financial, operational, and safety capabilities; the present value of the bid; and the bidder's willingness to accept the material terms of the prototype transaction documents (id. at 11). The NSTAR Companies state that J.P. Morgan presented its bid analysis to the NHPUC Staff, UOMA, and the sellers (id.). The NSTAR Companies state that the sellers then gave their consent to J.P. Morgan to conclude a transaction with the leading bidder (id.). The NSTAR Companies claim that the identity of the leading bidder was not disclosed to the sellers until final negotiations commenced (id. at 13).

The NSTAR Companies state that a negotiating team consisting of NHPUC Staff, UOMA, and J.P. Morgan conducted post-bid negotiations with the leading bidder on proposed changes to the transaction documents (id. at 12). The negotiating team reported regularly to, and received input from the sellers (id.). The selling owner committee did not participate in direct negotiations with the leading bidder (Tr. 1, at 122-24). The NSTAR Companies state that when these negotiations were concluded, the Sellers had a final opportunity to review and

approve the final transaction documents (Exh. NSTAR-2, at 12). The NSTAR Companies claim that all sellers approved the proposed sale according to the terms set forth in the final PSA (id. at 12-13; Exh. NSTAR-3).

2. Analysis and Findings

In evaluating the divestiture of generation assets, the Department first reviews whether the sale process was equitable and structured to maximize the value of the assets being sold. Western Massachusetts Electric Company, D.T.E. 00-68, at 12 (2000). In making these determinations, the Department considers whether the company used a “competitive auction or sale” that ensured “complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale.” G.L. c. 164, § 1A (b)(2).

The record establishes that the structure of the auction allowed bidders to establish the market value of Seabrook through an open and competitive market test (Exh. NSTAR-2, at 6-7, 9). J.P. Morgan solicited interest from a broad array of potential qualified bidders in the nuclear industry (Exh. NSTAR-2, at 6). All interested bidders had equal access to the necessary data and information, thereby facilitating due diligence inquiries (id. at 6-7). Moreover, each bidder was permitted to participate in meetings and site visits (id. at 7). The only information withheld from the participants during the auction process was the identity of the other bidders (id. at 9). The Department notes that no party has indicated any concern with respect to the management of or access to information. The record demonstrates that the auction process ensured complete, uninhibited, non-discriminatory access to all data and

information by all interested bidders and that the auction process was competitive. Therefore, the Department finds that the auction process used was equitable and structured to maximize the value of the assets sold.

C. Maximization of Asset Value

1. Positions of the Parties

a. Attorney General

The Attorney General opposes the NSTAR Companies' petition only on the grounds that Massachusetts customers should receive "the same favorable treatment regarding the sharing of excess decommissioning funds that the customers of the state of New Hampshire receive" (Attorney General Brief at 1).¹¹ The Attorney General contends that New Hampshire law requires Seabrook owners to "return to New Hampshire customers any excess funds that remain after decommissioning" (Attorney General Brief at 2). The Attorney General argues that the Department should condition the sale upon FPLE Seabrook returning to Massachusetts customers "a share of excess decommissioning funds to Massachusetts customers equal to [the Massachusetts utilities'] ownership share" and that the Department should prohibit any "staged closings" by the non-Massachusetts sellers omitting the Massachusetts utilities from the sale (id. at 3). The Attorney General asserts that the overall purchase price for Seabrook to be received by all sellers was reduced to compensate for the return of a portion of excess decommissioning funds to New Hampshire consumers alone (id.). Therefore, the Attorney

¹¹ The Attorney General does not argue that any other terms of the sale fail to maximize the value obtained for Seabrook.

General argues that Canal has not met its requirement to maximize the proceeds from the sale of its generation assets (Attorney General Brief at 3). The Attorney General argues that the PSA does not treat Massachusetts consumers fairly unless they are granted the same treatment as the customers of New Hampshire or Connecticut (id.).

b. NSTAR Companies

The NSTAR Companies state that the bids were evaluated based on whether the bids were most likely to enable J.P. Morgan and the Seabrook owners to achieve their objectives, which included meeting all requirements under New Hampshire and Connecticut law; transferring all material assets, entitlements, obligations, and liabilities associated with the Seabrook assets; maximizing opportunities for current Seabrook employees after the sale; and ensuring that the transaction would close in a timely manner (Exh. NSTAR-2, at 10-11). The NSTAR Companies claim that bids were also evaluated based upon an assessment of each bidder's financial, operational, and safety qualifications; the present value of the bid; and the bidder's willingness to accept the material terms of the prototype transaction documents (id. at 11). The NSTAR Companies contend that the sale price of \$836.6 million, excluding \$25.6 million attributable to Unit 2, translates into a per unit price of \$792 per kilowatt ("KW") of capacity purchased for Unit 1 (id. at 19). The NSTAR Companies claim that the proposed sale price "includes a 'control premium' that otherwise would not be realized by a future auction" of Canal's interest in Seabrook (NSTAR Companies Initial Brief at 16; see also Tr. 1, at 51-52, 54-56, 120).

With regard to the disposition of decommissioning funds, the NSTAR Companies state that the New Hampshire statute specifically referenced in § 5.10(h)(i) of the PSA¹² defines New Hampshire “customer contribution” to the decommissioning fund as “‘the portion of the [F]und contributed by New Hampshire customers of the electric utility, including interest and earnings as of the date of ownership transfer’ as determined by the [New Hampshire Nuclear Decommissioning Finance Committee (“NDFC”)]” (NEP/NSTAR Companies Joint Reply Brief at 3, citing N.H. Rev. Stat. Ann. § 162-F:21-b(II)(c)). The NSTAR Companies argue that in determining excess decommissioning funds, “customer contributions do not include interest and earnings that accrue after the date of closing and customer contributions are deemed to be applied first against decommissioning expenses” (NEP/NSTAR Companies Joint Reply Brief at 3). The NSTAR Companies point out that Massachusetts has no comparable statute in effect, but that treatment of excess decommissioning funds with respect to the Massachusetts utilities in accordance with the New Hampshire statute would address objections raised by the Attorney

¹² Specifically, the PSA provides:

- (i) any remaining Decommissioning Funds determined by the [New Hampshire Nuclear Decommissioning Finance Committee] to be New Hampshire customer contributions pursuant to [N.H. Rev. Stat. Ann. § 162-F:21-b(II)(c)], and
- (ii) any remaining Decommissioning Funds determined by the Governmental Authority having jurisdiction in Connecticut, Massachusetts and Rhode Island, as the case may be, to be customer contributions from the customers of such state under the applicable Law of such state, to the extent required by the applicable Law of such state, shall be paid by the Buyer in coordination with applicable Governmental Authority having jurisdiction in such state for the benefit of the customers of the relevant Seller or Sellers in such state.

(PSA at § 5.10(h)).

General regarding the disposition of decommissioning funds (id.). The NSTAR Companies argue, however, that requiring more favorable treatment for Massachusetts customers could adversely affect the closing of the transaction (id.).

c. FPLE Seabrook

FPLE Seabrook is in accord with the NSTAR Companies' position on maximization of asset value, i.e. that the sale will result in a substantial benefit to ratepayers and that the auction maximized asset value in a fair market test (FPLE Seabrook Initial Brief at 7). FPLE Seabrook also argues that because Canal's share is proposed to be sold as part of a bloc that will allow FPLE Seabrook to control the operations of Seabrook, Canal will receive a premium on the value of its share; conversely, FPLE Seabrook asserts that if Canal does not sell its interest as part of this control transaction, Canal could only sell at a discount price inherent in selling a minority share (id. at 6).

FPLE Seabrook contends, however, that the Department should reject the Attorney General's suggestion that the NSTAR Companies' Massachusetts customers be given a benefit equivalent to that of New Hampshire law (FPLE Seabrook Reply Brief at 6). FPLE Seabrook argues that the Department should not condition its approval of the sale "upon a particular outcome regarding the treatment of excess decommissioning funds or any modification to the terms of the Seabrook PSA" because the Attorney General has failed to make a "most compelling showing" that the Department should supplant the results of an open market test of asset value with an administrative determination of asset value (id., citing D.T.E. 98-119/126, at 29).

2. Analysis and Findings

The Department has held, pursuant to the Restructuring Act, that the results of a competitive auction are deemed to satisfy the requirement that the sale process maximize the value of the generation facilities being sold. D.T.E. 98-78/83, at 3-4, citing G.L. c. 164, § 1A(b)(1). An open, rational, transparent, and fairly managed auction tests the market for, and the value of, an asset at the time of the offering. Id. at 10. The bid results of such a market test under proven fair conditions are strong evidence of an asset's worth. Id. at 10-11. Further, the Department has held that, under the Restructuring Act, the bargained-for terms of a transaction achieved through "an open market-test is a better determinant of asset value than an administrative determination" and that "[o]nly upon the most compelling showing would the Department supplant the results of a market test." D.T.E. 98-119/126, at 29.

The Attorney General argues that the final PSA does not maximize the value of Canal's interest in Seabrook because customers of the New Hampshire utilities are accorded more favorable treatment than customers of the Massachusetts utilities with regard to decommissioning funds, and that the Department should place additional conditions on our approval of the NSTAR Companies' petition, including requiring that Massachusetts customers receive the same treatment as the customers of New Hampshire or Connecticut (Attorney General Brief at 3).¹³ For the reasons that follow, the Department concludes that to require Massachusetts customers to receive the same protections that New Hampshire customers receive

¹³ No party presented arguments regarding the disposition of decommissioning funds under Connecticut law. Therefore, we consider the Attorney General's argument with respect to New Hampshire law.

under New Hampshire law is appropriate and is consistent with, and does not supplant, the bargained-for terms of the PSA.

The PSA provides that any remaining decommissioning funds determined by the Department to be Massachusetts customer contributions “under the applicable Law of [Massachusetts], to the extent required by the applicable Law of [Massachusetts]” are to be paid by FPLE Seabrook to the sellers for the benefit of their customers (PSA at § 5.10(h)). The PSA further broadly defines the term “law” to include “all laws, rules, regulations, codes, injunctions, judgments, orders, decrees, rulings, interpretations, constitution, ordinance, common law, or treaty . . .” (PSA at § 13). The Department’s findings in this Order with respect to the disposition of Massachusetts customer contributions fall within the PSA’s broad definition of applicable “law,” and, therefore, are not additional conditions upon the transaction.

Further, the Department may reasonably interpret § 5.10(h) of the PSA to provide that Massachusetts customer contributions, including interest and earnings as of the date of the transfer of the Seabrook assets but not including interest and earnings added to the decommissioning funds after the transfer, must be returned to Massachusetts customers in the same manner as New Hampshire customer contributions are returned, if any such funds remain after decommissioning is completed. If the Department does not make such a finding, then the PSA treats Massachusetts customers in an unequal manner, which would be unacceptable.

The Department recognizes, however, that the benefits of the New Hampshire statute are unlikely to materialize. If, for example, all of the selling owners close the sale of their

Seabrook interests on December 31, 2002, the Decommissioning Trust Closing Amount will be \$232.72 million (PSA at § 5.10(a) n.1). FPLE Seabrook would have to complete decommissioning for less than \$232.72 million, regardless of inflation, in order for customers to receive a refund of their portion of customer contributions. Although the record demonstrates that the ultimate cost of decommissioning is highly volatile, the future cost of decommissioning in the year 2026 was forecast to be \$1,626,839,659 (Tr. 1, at 49, 57; Exh. DTE-NSTAR-1-22, att. 1, at 2). Thus, FPLE Seabrook would have to achieve a remarkable reduction in decommissioning costs before the contingent benefits of the New Hampshire statute would even materialize. Nevertheless, unless the Department finds that Massachusetts customer contributions must be refunded in the same manner as New Hampshire customer contributions, Massachusetts customers are treated in an unequal manner under the PSA. Although customers in both New Hampshire and in Massachusetts are unlikely to receive any refund of customer contributions when decommissioning is actually completed, the contingent claim itself has a positive value that Massachusetts customers otherwise would not receive.

As a matter of comity, any state regulatory body that oversees a transaction affecting utilities in multiple jurisdictions has an obligation to treat all participants fairly. There is no evidence in the record that either J.P. Morgan, NHPUC Staff, or UOMA acted in bad faith in negotiating the terms of § 5.10(h). To the contrary, the record demonstrates that J.P. Morgan negotiated on behalf of the non-New Hampshire selling owners adding the language in § 5.10(h)(ii) to make the treatment of excess customer contributions “equally applicable

across all states” (Tr. 1, at 34-35). Therefore, we conclude that applying equal treatment to all customers was the just and intended result.

Aside from the issue of the disposition of customer contributions to the decommissioning fund, the record demonstrates that the proposed sale of all sellers’ interests to FPLE Seabrook for \$836.6 million was the negotiated result of the highest bid in the Seabrook competitive auction (Exh. AG-NSTAR-1-15 [CONFIDENTIAL]). Further, the \$792 per KW price for Seabrook is one of the highest prices achieved in a nuclear auction and is higher than the value approved by the Department for the sale of Millstone Units 2 and 3 at \$664 per KW. See D.T.E. 00-68, at 9.

Accordingly, the Department finds that the proposed sale maximizes the value of the Seabrook asset price under the following condition. If decommissioning is completed at a cost that is less than the Decommissioning Trust Closing Amount as defined in § 5.10(a) of the PSA, as of the date of the transfer of ownership and not to include any interest or earnings that may subsequently accrue on the Decommissioning Trust Closing Amount, then the pro rata portion of the amount remaining that was contributed by the NSTAR Companies’ Massachusetts customers shall be refunded by FPLE Seabrook to Cambridge and Commonwealth¹⁴ for the benefit of their retail customers. We note that the Decommissioning

¹⁴ The Department notes that Canal, Cambridge, Commonwealth are subsidiaries of NSTAR Gas and Electric Corporation. Cambridge and Commonwealth have power purchase agreements with Canal. Cambridge’s and Commonwealth’s customers paid a decommissioning surcharge that was passed through Canal into the decommissioning fund. Therefore, any excess customer contributions paid by Massachusetts customers through Cambridge and Commonwealth to Canal should be refunded directly to Cambridge and Commonwealth for the benefit of retail customers, rather than to Canal.

Trust Closing Amount will not be known until the transactions contemplated in the PSA are completed. Therefore, we direct the NSTAR Companies and FPLE Seabrook to file a joint statement of the Decommissioning Trust Closing Amount and a statement of the amounts contributed by Cambridge's and Commonwealth's retail customers through Canal within thirty days of the completion of the Initial Closing and all Subsequent Closings, as referenced in § 5.10(a) of the PSA.¹⁵

D. Consistency with Companies' Restructuring Plan and Restructuring Act

The Department has held that a divestiture transaction will be determined to be consistent with a company's restructuring plan or settlement agreement if the company demonstrates to the Department that the "sale process is equitable and maximizes the value of the existing facilities being sold." D.T.E. 00-68, at 3; D.T.E. 98-119/126, at 4-5. The NSTAR Companies' restructuring plan specifically provides for the divestiture of its interests in generating plants in order to mitigate fully their transition costs. Cambridge Electric Light Company, Commonwealth Electric Company, Canal Electric Company, D.P.U./D.T.E. 97-111, at 64 (Feb. 27, 1998). Because the Department has found that the sale process is equitable and structured to maximize value, and because the value of Seabrook has

¹⁵ Because our findings that Massachusetts customer contributions should be treated in the same manner as New Hampshire customer contributions are within the terms of the approvals required under the PSA, the Department need not rule on the Attorney General's argument that the Department should prohibit non-Massachusetts utilities from closing the sale of their interests without the Massachusetts utilities (Attorney General Brief at 12). Moreover, the Attorney General cites no statute or precedent in support of enjoining the sale of generation interest by non-Massachusetts utilities over which the Department does not assert jurisdiction.

been maximized subject to our findings regarding the disposition of decommissioning funds, the Department finds that the Seabrook divestiture is consistent with the NSTAR Companies' restructuring plan and consistent with the Restructuring Act.

IV. POWER PURCHASE AGREEMENT

A. Introduction

In connection with Canal's proposed sale of its interest in Seabrook, Cambridge and Commonwealth propose to buy out their existing power purchase agreement with Canal ("Seabrook PPA") (Exh. NSTAR-4).¹⁶ The Seabrook PPA is a long-term contract under which Commonwealth and Cambridge purchase 80.06 percent and 19.94 percent, respectively, of Canal's entitlement to a share of the power produced by Seabrook Unit 1 (*id.*). In accordance with the buyout agreement, Commonwealth and Cambridge will pay \$14.4 million to Canal to buy out of any and all of their obligations pursuant to the Seabrook PPA (Exhs. NSTAR-1, at 11-12; NSTAR-4).

B. Positions of the Parties

According to the NSTAR Companies, the buyout will save Cambridge's and Commonwealth's customers approximately \$5.821 million in stranded costs associated with

¹⁶ The existing power purchase agreement between the Canal, Cambridge, and Commonwealth consists of an agreement dated September 1, 1986, as amended by eight agreements dated June 1, 1988, February 28, 1990, December 5, 1991, December 19, 1991, March 6, 1992, November 1, 2000, April 1, 2001, and December 18, 2001, providing for the sale of capacity and related energy by Canal from Seabrook to Cambridge and Commonwealth under a life-of-the-unit agreement (Exh. NSTAR-1, at 11). The agreement is currently anticipated to last until the year 2026 (*id.*).

Seabrook Unit 1 and provide an additional savings of \$2.3 million associated with Seabrook Unit 2, as compared to their costs if Cambridge and Commonwealth continued to purchase power pursuant to the Seabrook PPA (Exh. NSTAR-1, at 13; RR-DTE-3(b)). The NSTAR Companies base their estimate of customer savings on a forecast of the future costs of the operation of Seabrook and the projected market prices for capacity and energy through the year 2026 (Exh. NSTAR-5; RR-DTE-3).

The NSTAR Companies argue that the buyout costs are lower than the costs associated with continuing the current Seabrook PPA and that the buyout agreement is consistent with the public interest.¹⁷ They contend that termination of the Seabrook PPA will mitigate the transition costs to the maximum extent possible, lowering the rates for their customers (NSTAR Companies Brief at 15). In addition, the NSTAR Companies assert that their ratepayers will benefit from avoiding the risk of additional costs associated with the continued obligation to purchase the output from Seabrook, such as potential increases in projected capital additions, operating costs, and decommissioning costs (*id.* at 16). Moreover, according to the NSTAR Companies, reductions in unit availability or projected market prices for electricity could reduce the value of the projected output of the plant (*id.*).

C. Analysis and Findings

In determining whether to approve a power contract buyout, buy-down, or

¹⁷ No other party commented on the NSTAR Companies' proposal to terminate the Seabrook PPA.

renegotiation, the Department has applied its standard of review of settlement agreements, i.e., a standard of reasonableness. See, e.g., Cambridge Electric Light Company, D.T.E. 01-94, at 7 (2002); Commonwealth Electric Company, D.T.E. 99-69, at 7 (1999); Boston Edison Company, D.T.E. 99-16, at 5-6 (1999); Western Massachusetts Electric Company, D.T.E. 99-56, at 7-8 (1999). The Department must review all available information to ensure that the agreement is consistent with the public interest. See, e.g., Western Massachusetts Electric Company, D.T.E. 99-101, at 5-6 (2000); Commonwealth Electric Company, D.P.U. 91-200, at 5 (1993).

The Restructuring Act requires any electric company that seeks to recover transition costs to mitigate those costs to the maximum extent possible, and as part of its mitigation efforts, the company must make a good faith effort to renegotiate any above-market power purchase contracts. G.L. c. 164, §§ 1G(d)(1) and (2). The Restructuring Act further provides that if a negotiated contract buyout or other modification to the terms and conditions of such contracts “is likely to achieve savings to the ratepayers and is otherwise in the public interest,” the Department may allow the company to recover the remaining amounts in excess of market value associated with the contract in the transition charges. G.L. c. 164, §§ 1G(b)(1)(iv) and 1G(d)(2).

While applying this standard, the Department must determine whether terminating the Seabrook PPA is consistent with the Restructuring Act and maximizes the mitigation of transition costs. See, e.g., D.P.U./D.T.E. 97-111, at 64; D.T.E. 01-94, at 8. NSTAR claims that as a result of terminating the Seabrook PPA, Cambridge’s and Commonwealth’s ratepayers

will save approximately \$5.821 million in stranded costs associated with Seabrook Unit 1 and provide an additional savings of \$2.3 million associated with Seabrook Unit 2 (Exh. NSTAR-1, at 13; RR-DTE-3(b)). In support of its claim, the Company presented economic analyses of the future electricity market prices, the projected output of Seabrook, as well as its projected capital, operating, maintenance, and decommissioning costs (Exhs. NSTAR-5; AG-NSTAR-2-7; DTE-NSTAR-1-35; RR-DTE-3). After reviewing the economic analysis, the Department finds NSTAR's claims of savings to be credible, and that terminating the Seabrook PPA is likely to achieve savings to ratepayers. The Department also finds that terminating the Seabrook PPA maximizes the level of transition cost mitigation.¹⁸

Because terminating the Seabrook PPA will achieve savings for ratepayers as well as other benefits, and because the savings mitigate the NSTAR Companies' transition costs, the Department finds that the buyout is in the public interest and consistent with the requirements of G.L. c. 164, § 1G(d)(2)(ii). Therefore, the Department approves the buyout agreement to terminate the Seabrook PPA between Cambridge, Commonwealth, and Canal.

V. DESIGNATION OF SEABROOK AS AN ELIGIBLE FACILITY

The NSTAR Companies also have requested that the Department make findings necessary for the Seabrook assets to be declared "eligible facilities" under PUHCA, so that FPLE Seabrook can seek a determination from FERC that acquiring the divested assets

¹⁸ The Department agrees with the NSTAR Companies' claim that terminating the Seabrook PPA provides additional benefits to ratepayers by eliminating the risks, albeit unquantifiable, associated with the uncertainties of the unit availability, capital costs, operating and maintenance costs, and decommissioning costs.

qualifies it to be an EWG under § 32 of PUHCA. That section defines an EWG to be a person “exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.”

15 U.S.C. § 79z-5a(a)(1). An eligible facility is one “used for the generation of electric energy exclusively for sale at wholesale.” 15 U.S.C. § 79z-5a(a)(2). With respect to such a facility that was already under construction or operating on the date of the enactment of § 32 and already covered in state rates or charges for electric energy sold directly to customers, specific findings from the Department are required before such facility may become an eligible facility. These findings are “that allowing such facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law”

15 U.S.C. § 79z-5a(c).

According to the NSTAR Companies, without EWG status, the Seabrook assets would be “virtually unmarketable,” and the price obtained would be greatly reduced (Exh. NSTAR-1, at 16). The NSTAR Companies claim that if FPLE Seabrook does not obtain EWG status, Massachusetts customers will lose the benefit of the sale (Tr. 1, at 135). The record demonstrates that the sale will mitigate transition costs by approximately \$6 million (Tr. 1, at 115-16; Exh. NSTAR-1, at 13; RR-DTE-3(b)). Because the Department finds that the transaction will mitigate transition costs, and because the ability of FPLE Seabrook to obtain EWG status is essential to the transaction, the Department finds that treating the Seabrook assets as an eligible facility will benefit consumers. Further, because the Department finds that the sale is consistent with NSTAR’s restructuring plan and consistent with the Restructuring Act,

treating the Seabrook assets as an eligible facility will be in the public interest. Finally, because the proposed sale of Seabrook to an exempt wholesale generator is consistent with NSTAR's restructuring plan and with the Restructuring Act's goal of "an expedient and orderly transition from regulation to competition in the generation sector," the Department finds that treating the Seabrook assets as an eligible facility does not violate State law. St. 1997, c. 164, § 1(m); see generally G.L. c. 164.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Petition of Canal Electric Company, Cambridge Electric Light Company, and Commonwealth Electric Company for approval of the sale of Canal Electric Company's interest Seabrook Nuclear Power Station, located in Seabrook, New Hampshire, to FPL Energy Seabrook, LLC is APPROVED consistent with the findings and directives contained in this Order; and it is

FURTHER ORDERED: That within thirty (30) days after the Decommissioning Trust Closing Amount is fixed after the Initial Closing and each Subsequent Closing are completed, as referenced in § 5.10(a) of the Purchase and Sale Agreement, Canal Electric Company, Cambridge Electric Light Company, Commonwealth Electric Company, and FPLE Seabrook shall jointly file with the Department a statement of the Decommissioning Trust Closing Amount and a statement of the total Massachusetts customer contributions that were contributed to the amount by retail customers of Cambridge Electric Light Company and of Commonwealth

Electric Company through Canal Electric Company consistent with the findings and directives in this Order; and it is

FURTHER ORDERED: That the Petition of Canal Electric Company, Cambridge Electric Light Company, and Commonwealth Electric Company for approval of the Buyout Agreement is APPROVED consistent with the findings and directives contained in this Order; and it is

FURTHER ORDERED: That the Petition of Canal Electric Company, Cambridge Electric Light Company, and Commonwealth Electric Company for findings that the treatment of the Seabrook assets as “eligible facilities” pursuant to the Public Utilities Holding Company Act will benefit consumers, is in the public interest, and does not violate State law is APPROVED consistent with the findings and directives contained in this Order.

By Order of the Department,

/s
Paul B. Vasington, Chairman

/s
James Connelly, Commissioner

/s
W. Robert Keating, Commissioner

/s
Eugene J. Sullivan, Jr., Commissioner

/s
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).